

This is in response to a letter, dated June 5, 2007, and prior correspondence from your authorized representative, requesting an extension of time under § 2642(g) of the Internal Revenue Code and § 301.9100 of the Procedure and Administration Regulations to make allocations of GST exemption to a trust.

Facts

On Date 1, Year 1, Donor and Spouse created an irrevocable trust, Trust, for the benefit of Child, Grandchild 1, Grandchild 2, and other family members. Trustee, a bank, is the trustee of Trust.

Under Paragraph Second, sections (K) and (L), the trustee may pay to or apply for the benefit of Child any amount from the net income of Trust that trustee deems advisable and any amount of principal the trustee deems advisable for Child's care, support, maintenance and education.

Under Paragraph Third, sections (D) and (E), at the death of the survivor of Donor and Spouse, the trustee is directed to hold in trust \$W to benefit Grandchild 1 and \$W to benefit Grandchild 2.

Paragraph Fourth, which governs the trusts for Grandchild 1 and Grandchild 2, provides that the trustee pay the net income to the beneficiary and any principal to the beneficiary for care, support, maintenance, education, purchasing a home, and entering a business. Each grandchild may request, in writing, to withdraw one-third of her respective trust after attaining the age of thirty, one-half of the trust at age thirty-five, and the balance at age forty. Each grandchild has a limited power of appointment to appoint any part or all of her trust to the issue of Donor and Spouse by referring to the power in her last will. In default of such appointment, the trust will be distributed to the grandchild's surviving issue by right of representation.

In Years 1, 2, 3, 4, and 5, Donor and Spouse made transfers to Trust, elected to gift-split and Trustee filed Forms 709, United States Gift (and Generation-Skipping Transfer) Tax Return to report these gifts. However, Trustee failed to allocate Donor's and Spouse's GST exemption to the transfers to Trust on the returns.

In Year 5, Donor died. In Year 6, Spouse made a transfer to Trust and reported the gift on a Form 709. However, no allocation of Spouse's GST exemption was made to that transfer. Spouse did not make any transfers to Trust in Years 7 and 8. In Years 9, 10 and 11, Spouse made transfers to Trust, however, no Forms 709 were filed to report the gifts to Trust and, accordingly, no allocation of Spouse's GST exemption was made to those transfers. Spouse made a transfer to Trust in Year 12 and filed a Form 709, but did not allocate Spouse's GST exemption to the transfer. Spouse died in Year 13.

In Trustee's affidavit, Trustee swore that she prepared Years 1 through Year 6 Forms 709's for Donor and Spouse and inadvertently did not allocate Donor's and Spouse's GST exemption to the transfers to Trust. In addition, Trustee swore that she did not prepare returns for Spouse in Years 9 through 12. Trustee swore that Donor and Spouse relied on Trustee for advice related to tax returns and did not understand the implications of failing to allocate GST exemption to the transfers to Trust.

It is represented that no distributions have been made to Grandchild 1 and Grandchild 2 from her respective trust.

Trustee requests an extension of time under § 2642(g) and § 301.9100 to: (i) allocate Donor's available GST exemption to the portion of the Year 1 through Year 5 transfers to Trust for which Donor is the transferor and that Donor's allocations be made based on the value of the property as of the dates of the transfers to Trust and (ii) allocate Spouse's available GST exemption to the portion of Grandchild 1 Trust and Grandchild 2 Trust for which Spouse is the transferor and that Spouse's allocations be made based on the value of the property as of the date the two trusts come into existence (ie., the date of Spouse's death).

Law and Analysis

Section 2501 imposes a tax on the transfer of property by gift by an individual. Section 2511 provides that the tax imposed by § 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 2513(a) provides that a gift made by one spouse to any person other than his or her spouse shall, for purposes of this chapter, be considered as made one-half by one spouse and one-half by the other spouse, but only if at the time of the gift each spouse is a citizen or resident of the United States.

Section 2601 imposes a tax on every generation-skipping transfer (GST). A GST is defined under § 2611(a) as (1) a taxable distribution, (2) a taxable termination, and (3) a direct skip.

Section 2631(a) provides that, for purposes of determining the inclusion ratio, every individual shall be allowed a GST exemption amount that may be allocated by such individual (or his executor) to any property with respect to which such individual is the transferor. Section 2631(b) provides that any allocation under § 2631(a), once made, shall be irrevocable.

Section 2632(a) provides that any allocation by an individual of his or her GST exemption under § 2631(a) may be made at any time on or before the date prescribed for filing the estate tax return for such individual's estate (determined with regard to extensions), regardless of whether such a return is required to be filed.

Section 26.2632-1(b)(4) of the Generation-Skipping Transfer Tax Regulations provides that an allocation of GST exemption to property transferred during the

transferor's lifetime, other than in a direct skip, is made on Form 709. Except as provided otherwise, an allocation of GST exemption is effective as of the date of any transfer as to which the Form 709 on which it is made is a timely filed return.

Section 2642(b)(1) provides that, except as provided in § 2642(f), if the allocation of the GST exemption to any transfers of property is made on a gift tax return filed on or before the date prescribed by § 6075(b) for such transfer the value of such property for purposes of § 2642(a) shall be its value as finally determined for purposes of chapter 12 (within the meaning of § 2001(f)(2)).

Section 2642(g)(1)(A) provides, generally, that the Secretary shall by regulation prescribe such circumstances and procedures under which extensions of time will be granted to make an allocation of GST exemption described in § 2642(b)(1) or (2).

Section 2642(g)(1)(B) provides that in determining whether to grant relief under this paragraph, the Secretary shall take into account all relevant circumstances, including evidence of intent contained in the trust instrument or instrument of transfer and such other factors as the Secretary deems relevant. For purposes of determining whether to grant relief, the time for making the allocation (or election) shall be treated as if not expressly prescribed by statute.

Notice 2001-50, 2001-2 C.B. 189, provides that under § 2642(g)(1)(B), the time for allocating GST exemption to lifetime transfers and transfers at death, the time for electing out of the automatic allocation rules, and the time for electing to treat any trust as a GST trust are to be treated as if not expressly prescribed by statute. The Notice further provides that taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Section 2652(a)(1)(B) provides that for purposes of chapter 13, except as provided in § 2653(a), the term "transferor" means in the case of any property subject to the tax imposed by chapter 12, the donor. Section 2652(a)(2) provides that if, under § 2513, one-half of a gift is treated as made by an individual and one-half of such gift is treated as made by the spouse of such individual, such gift shall be so treated for purposes of this chapter. Accordingly, in the case of a transfer with respect to which the donor's spouse makes an election under § 2513 to treat the gift as made one-half by the spouse, the electing spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor, regardless of the interest the electing spouse is actually deemed to have transferred under § 2513. § 26.2652-1(a)(4). The donor is treated as the transferor of one-half of the value of the entire property.

Section 2654(b)(1) and (2) provide that for purposes of chapter 13, the portion of a trust attributable to transfers from different transferors shall be treated as separate trusts, and substantially separate and independent shares of different beneficiaries in a trust shall be treated as separate trusts.

Section 301.9100-1(c) provides that the Commissioner has discretion to grant a reasonable extension of time under the rules set forth in §§ 301.9100-2 and 301.9100-3

to make a regulatory election, or a statutory election (but no more than 6 months except in the case of a taxpayer who is abroad), under all subtitles of the Internal Revenue Code except subtitles E, G, H, and I.

Section 301.9100-3 provides the standards used to determine whether to grant an extension of time to make an election whose due date is prescribed by a regulation (and not expressly provided by statute). Under § 301.9100-1(b), a regulatory election includes an election whose due date is prescribed by a notice published in the Internal Revenue Bulletin. In accordance with § 2642(g)(1)(B) and Notice 2001-50, taxpayers may seek an extension of time to make an allocation described in § 2642(b)(1) or (b)(2) or an election described in § 2632(b)(3) or (c)(5) under the provisions of § 301.9100-3.

Requests for relief under § 301.9100-3 will be granted when the taxpayer provides the evidence to establish to the satisfaction of the Commissioner that the taxpayer acted reasonably and in good faith, and that granting relief will not prejudice the interests of the government.

Section 301.9100-3(b)(1)(v) provides that a taxpayer is deemed to have acted reasonably and in good faith if the taxpayer reasonably relied on a qualified tax professional, including a tax professional employed by the taxpayer, and the tax professional failed to make, or advise the taxpayer to make, the election.

Based upon the information provided and the representations made, we conclude that the requirements of § 301.9100-3 have been satisfied. For the years in which Donor and Spouse elected to split gifts, Years 1 through 5, Spouse is treated for GST purposes as the transferor of one-half of the entire value of the property transferred to Trust by Donor, regardless of the interest Spouse is actually deemed to have transferred under § 2513. For GST purposes, Donor and Spouse are each treated as the transferor of one-half of the value of the entire property transferred to the Trust.

We rule that Trustee is granted an extension of time of 60 days from the date of this letter to allocate Donor's available GST exemption to the portion of the Year 1 through 5 transfers to Trust for which Donor is the transferor. The allocations will be effective as of the date of the transfers to Trust.

Further, we rule that Trustee is granted an extension of time of 60 days from the date of this letter to allocate Spouse's available GST exemption to the portion of Grandchild 1 Trust and Grandchild 2 Trust for which Spouse is the transferor. The allocations will be effective as of the date Grandchild 1 Trust and Grandchild 2 Trust come into existence (ie, the date of Spouse's death).

Trustee should make Donor's allocations on a Supplemental Form 709 and Spouse's allocations on a Supplemental Form 709 filed with the Internal Revenue Service Center, Cincinnati, Ohio 45999. A copy of this letter should be attached to the Forms. Two copies are enclosed for this purpose.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

William P. O'Shea
Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
(2) Copies of this letter